

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F705745

TOMMY WILLIAMS, EMPLOYEE	CLAIMANT
REMINGTON ARMS CO., INC., EMPLOYER	RESPONDENT NO. 1
GALLAGHER BASSETT SERVICES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 19, 2008

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM C. FRYE,
Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed November 16, 2007.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties in 2006.

2. The claimant has failed to meet his burden of proving a compensable hernia as defined by Ark. Code Ann. §11-09-523.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and

conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant has failed to meet his burden of proving a compensable hernia as defined by Ark. Code Ann. §11-9-523. After a de novo review of the record in its entirety, I find that the claimant has proved by a preponderance of the evidence that his ventral hernia injury is a compensable consequence of his prior compensable hernia injuries. I find that the claimant is entitled to additional medical and disability benefits based

upon the ventral hernia surgically repaired by Dr. Gibbs, therefore, I must respectfully dissent.

Ark. Code Ann. §11-9-523 sets out five requirements for a hernia injury to be compensable:

- (1) That the occurrence of the hernia immediately followed as the result of a sudden effort, severe strain, or the application of force directly to the abdominal wall;
- (2) That there was severe pain in the hernial region;
- (3) That the pain caused the employee to cease work immediately;
- (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and,
- (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

Here, the claimant sustained an admittedly compensable hernia injury on May 1, 2006. As a result of that injury, the claimant was diagnosed as suffering from an inguinal hernia and an umbilical hernia. Both of these were surgically repaired, and the claimant returned to work. The

claimant testified that on or about June 30, 2006, he began suffering from pain in his stomach or groin and contacted his physician regarding this problem. The doctor prescribed additional pain medication for him and the claimant continued working. The claimant later sought additional medical treatment in September 2006, when he was diagnosed with a ventral hernia. A successful second surgical repair of this hernia was performed on the claimant on September 28, 2006. The claimant was eventually assessed with an impairment rating of 10% to the body as a whole. There is no dispute that the claimant satisfied those requirements in regard to the inguinal and umbilical hernias which he sustained on May 1, 2006. It is also not disputed that the claimant did not meet those five requirements in regard to the ventral hernia which developed some time after June 30, 2006. In his testimony, the claimant frankly admitted that the pain and other difficulties arising from the ventral hernia were not the result of any particular event or, a "sudden effort, severe strain, or application of force... ."

However, I find that the majority has erred by focusing on whether the ventral hernia was the result of a specific hernia incident. I find that the ventral hernia was not the result of a second injury, but was, in fact, the compensable consequence of the original hernia injury. That is, I find that the first incident significantly injured the claimant's stomach muscles and abdominal tissues and made the second hernia an inevitable result.

The medical record makes the progression of the claimant's injury abundantly clear. First, I note that the claimant's accident in May 2006 resulted in a serious enough injury that he sustained not one, but two hernias. While both of these were successfully repaired, it is evident that this injury resulted in a significant weakening in the claimant's abdominal muscles. While it is true that the claimant was released to return to work in June 2006, a short while after, he began suffering from pain and other symptoms related to his stomach. This is evidenced by the note from his doctor dated June 30, 2006, in which he stated that the claimant continued to complain of ongoing pain.

When the claimant returned to his doctor for treatment in September 2006, he was diagnosed with a ventral hernia. The claimant's treating physician, Dr. Mark Gibbs, repaired that defect on September 28, 2006. In his operative note of that date, he made the following statement, "It was also noted his abdominal wall fascia throughout the abdomen particularly the midline was markedly weakened and thin probably secondary in some degree to diastasis recti."

In using the phrase "diastasis recti" the doctor is referring to the rectus abdominus, the long stomach muscle that runs through the abdomen. The phrase "diastasis" is a medical condition meaning an abnormal separation. Since the only occasion where such an abnormal separation could have occurred would have been in the claimant's original accident, therefore, the claimant's resulting ventral hernia was directly related to his original, compensable injury. Dr. Gibbs', in his letter of October 24, 2006, states:

This patient has had three different hernias in the groin, umbilical area and ventral hernia. It is my opinion that this patient is at high risk for recurrence of hernias and/or developing other areas of herniation.

It is apparent that the claimant's injury made him more susceptible to subsequent hernias. In returning to work, the claimant's job duties required him to push large carts weighing approximately 1,500 pounds. This type of heavy activity almost certainly precipitated the second hernia. Significantly, the claimant performed this job for some two-and-a-half years prior to the first hernia injury. However, only a few weeks after returning to work, he began developing symptoms of a recurrent hernia which eventually resulted in a surgical procedure in September 2006, approximately three months following his return to work. Since then, his employer placed him on a lighter-duty job which did not require the heavy lifting.

This case is very similar to Oak Grove Lumber Company v. Highfill, 52 Ark. App. 42, 968 S.W.2d 637 (1998). In that case, the claimant injured his foot when he dropped a sledge hammer on it. He was diagnosed with an undisplaced fracture. Later, while attending a church activity at a local park, the claimant stumbled over a tree root causing an additional injury to his foot. He was later diagnosed

with a displaced fracture in his foot. The respondent argued that this second incident was not compensable since it did not occur at work. However, the Commission, in a decision affirmed by the Court of Appeals, held that the second fracture was a compensable consequence of the job-related injury. Specifically, if not for the undisplaced fracture at work, the incident with the tree root would not have caused the claimant to sustain a more severe break in his foot. The standard adopted by the Court in this case was that since the subsequent injury was the natural consequence of the first fracture, it entitled the claimant to receive appropriate benefits. See also, Eagle Safe Corporation v. Egan, 39 Ark. App. 79, 842 S.W.2d 438 (1992); and, Wolfe v. City of El Dorado, 33 Ark. App. 25, 799 S.W.2d 812 (1990).

Another issue that arose in this case was the claimant's entitlement to permanent partial disability benefits. In this regard, I note that at the request of the respondent, the claimant was seen by Dr. Barry Baskin, a consulting physician who evaluated the claimant on February 12, 2007. In his report relating to that examination, he

reviewed the claimant's medical history and noted that he had sustained inguinal and umbilical hernias but that he had a "re-hernia around the umbilicus and had an abdominal hernia ventrally that was repaired with mesh by Dr. Gibbs." He went on to conclude that the claimant had frequent protrusions which increased abnormal pressure which entitled him to receive a 10% impairment to the body as a whole based upon the relevant sections of the AMA Guides.

The majority, by affirming and adopting the Administrative Law Judge, has concluded that all of the impairment rating was based upon the claimant's ventral hernia. Since the majority finds the ventral hernia not compensable, the majority finds that the claimant is not entitled to any disability benefits. In my opinion, this finding is erroneous.

In the first place, the ventral hernia was the natural consequence of the claimant's original compensable injury. Therefore, there is no significance as to whether the impairment rating was based upon one of the three hernias or on the combined effect of all of them. Further,

since all of the impairment is based upon the original injury, the Fund would have no liability.

However, even if it were true that the ventral hernia was unrelated to the claimant's original compensable injury, which I do not find, the respondent would still be liable for paying the claimant additional permanent partial disability benefits. Dr. Baskin's impairment rating is not based solely upon the ventral hernia. Rather, it is based upon the overall condition of the claimant's stomach muscles. I do not find it possible to separate this impairment rating based upon which of the three hernias were primarily the cause of the protrusion. In fact, I note that Dr. Baskin specifically referred to the ventral hernia as a "re-herniation" which would indicate that the claimant's resulting condition was caused by all three of the conditions considered together. Considering that the original accident resulted in two hernias in the claimant's stomach area, it is apparent to me that they would be the major cause of this injury rather than the subsequent ventral hernia. On that basis, I find that the respondent

would be liable for providing the claimant benefits based upon the 10% impairment rating.

I also note that after the claimant was released to work by Dr. Gibbs after his second surgery, he was restricted from lifting anything in excess of 25 pounds. As a result of that, the claimant was given a lighter-duty job that paid less. This would entitle the claimant to receive wage-loss disability benefits.

In conclusion, I find that the claimant's ventral hernia is a compensable consequence of the claimant's prior compensable hernia injuries. I find that the claimant is entitled to additional medical and disability benefits, specifically, a 10% anatomical impairment rating to the body as a whole based upon the relevant sections of the AMA Guides.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner